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D.P.U./D.T.E. 97-88/97-18 (Phase II)

Investigation by the Department of Telecommunications and Energy on its own motion regarding (1) implementation of Section 276 of the Telecommunications Act of 1996 relative to Public Interest Payphones, (2) Entry and Exit Barriers for the Payphone Marketplace, (3) New England Telephone and Telegraph Company d/b/a NYNEX's Public Access Smart-Pay Line Service, and (4) the rate policy for operator service providers.

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I. INTRODUCTION

This Order concerns the requirements for pricing wholesale payphone access services under the Telecommunications Act of 1996 (“the Act” or “the 1996 Act”)¹ and the applicable rules of the Federal Communications Commission (“FCC”). At issue are whether the existing tariffed rates for Verizon–Massachusetts’ (“Verizon”) Public Access Line (“PAL”) and Public Access Smart-Pay Line (“PASL”) services, which are services that Verizon provides to independent payphone providers (“IPPs”), as well as to Verizon’s own retail payphone business, should be allowed to remain in effect given the FCC’s clarifications and directives regarding requirements for payphone access line rates and the Department’s directives with regard to the appropriate cost methodology to be applied in Massachusetts. The Department allowed the existing rates for PASL services to take effect on April 1, 1997 (the PAL rates were already in effect); these rates have been in effect throughout the pendency of this proceeding.

II. BACKGROUND AND PROCEDURAL HISTORY

To promote competition in the payphone industry, Section 276 of the Act prohibits Bell Operating Companies (“BOCs”), such as Verizon, from discriminating in favor of their own payphone services.² In a series of orders beginning in 1996 implementing Section 276, the

¹ Pub. L. No. 104-104, 110 Stat. 56. The 1996 Act amended the Communications Act of 1934, 47 U.S.C. §§ 151 et seq.

² Section 276 of the Act directed the FCC to prescribe new rules governing the payphone industry which would promote competition among payphone providers and promote the widespread deployment of payphone service to the benefit of the general public. In
(continued...)

FCC unbundled local exchange carrier (“LEC”) payphone services from payphone equipment and required that LECs provide payphone service providers (“PSPs”) unbundled wholesale payphone access lines that can be used with “smart” or “dumb” payphones.³ In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, First Report and Order, 11 FCC Rcd 20541 (1996) (“First Payphone Order”); Order on Reconsideration, 11 FCC Rcd 21233 (1996) (“Payphone Reconsideration Order”), aff’d in part and remanded in part, Illinois Pub.

²(...continued)

addition, Section 276 states that any BOC that provides payphone service “shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and . . . shall not prefer or discriminate in favor of its payphone service.” 47 U.S.C. § 276(a).

In addition, Section 276 does the following: (1) establishes a per call compensation plan to ensure that all payphone service providers are fairly compensated for all completed intrastate and interstate calls using their payphones; (2) discontinues the intrastate and interstate carrier access charge payphone service elements and payments and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues; and (3) prescribes a set of nonstructural safeguards for BOCs’ payphone services. See id. at § 276(b)(1)(A)-(C).

³ Verizon’s PAL service is purchased by PSPs that have “smart” payphones (i.e., payphones with coin functionality built into the payphone) and consists of a basic access line. Verizon’s PASL service is purchased by Verizon’s own retail payphone business and by PSPs that have “dumb” payphones (i.e., payphones without coin functionality built into the payphone). Verizon offers PAL service on both a retail and resale basis for both unlimited and measured service. See Tariff M.D.T.E. No. 10, Part A, § 8.1.6; Tariff M.D.T.E. No. 14, § 5.1.2. Verizon offers three types of PASL service: Basic Coin Access Line (“BCAL”), Charge-A-Call, and Inmate service. See Tariff M.D.T.E. No. 10, Part A, § 8.1.4. Verizon’s BCAL service consists of the access line, central-office based coin functionality, and blocking features. Id. Verizon’s Inmate service allows only coinless, collect calls, and contains other restrictions required by correctional facilities. Id. Verizon’s Charge-A-Call service allows credit card calls only. Id.

Telecomms. Ass'n v. FCC, 117 F.3d 555 (D.C. Cir. 1997); Second Report and Order, 13 FCC Rcd 1778 (1997) ("Second Payphone Order"), vacated and remanded, MCI Telecomms. Corp. v. FCC, 143 F.3d 606 (D.C. Cir. 1998), Third Report and Order, 14 FCC Rcd 2545 (1999) ("Third Payphone Order"), aff'd, American Pub. Comm. Council v. FCC, 215 F.3d 51 (D.C. Cir. 2000).⁴ In the First Payphone Order at ¶¶ 146-149, the FCC required that LECs provide under tariff the same payphone service to competing PSPs that they provide to their own retail payphone business. Thus, LECs were required to offer individual central office coin transmission services to payphone providers under nondiscriminatory, public tariffs, if the LECs provided those services for their own retail payphone operations. Id. The FCC required LECs to file tariffs with rates, terms, and conditions for these services for effect by April 15, 1997. Second Payphone Order at ¶ 8 n.22. The FCC required that rates for LECs' wholesale payphone services be: (1) cost-based; (2) consistent with the requirements of Section 276 (e.g., subsidies from exchange and exchange access services must be removed); (3) non-discriminatory; and (4) consistent with the FCC's Computer III tariffing guidelines, including the FCC's "new services test." See Payphone Reconsideration Order at ¶ 163, citing In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, CC Docket No. 90-623, Report and Order, 6 FCC Rcd 7571 (1991) ("Computer III").⁵

⁴ For ease of reference, these cases are collectively referred to throughout this Order as the "Payphone Orders."

⁵ The FCC's new services test requires that the rates for LEC payphone services be based on the direct cost of the service and recover a reasonable portion of overhead
(continued...)

On December 31, 1996, Verizon (then New England Telephone and Telegraph Company d/b/a NYNEX) filed with the Department proposed changes to its tariffs, M.D.P.U. Nos. 10 and 15, to comply with these FCC requirements by implementing a PASL service offering that would be available to retail payphone providers along with Verizon's existing PAL service.⁶ On January 29, 1997, the Department suspended the tariff filing until July 30, 1997, to allow for further investigation. The Department docketed the matter as D.P.U. 97-18.⁷ On March 14, 1997, the Department issued notice of Verizon's filing, stating that the Department intended to allow the proposed tariff changes to go into effect, and invited interested persons to comment.⁸ On March 31, 1997, the Department vacated the January 29, 1997 Suspension Order, thereby allowing Verizon's PASL tariff to take effect on April 1, 1997. See D.P.U. 97-18, Order Vacating Suspension (March 31, 1997). In a later Order, the Department stated its reasons for allowing Verizon's tariff to take effect, noting the

⁵(...continued)

costs. See Computer III at ¶ 64 n.108; see also Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Sub-Elements for Open Network Architecture, CC Docket No. 89-79, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, at ¶¶ 38-41 (1991).

⁶ Verizon initially named the service Public Access Smartline but later changed it to Public Access Smart-Pay Line.

⁷ The suspension order also addressed a January 24, 1997 Verizon tariff filing to eliminate the tariff rate for local coin payphone calls, also made in compliance with the FCC's First Payphone Order. See D.P.U. 97-18, Order on Suspension (January 29, 1997).

⁸ Several parties submitted comments, including Verizon and the New England Public Communications Council, Inc. ("NEPCC").

FCC's deadline for LECs to have nondiscriminatory, public tariffed payphone service offerings in effect by April 15, 1997. See D.P.U. 97-18, at 12 (April 14, 1997). However, in that Order, the Department also determined that further investigation of Verizon's PASL filing was necessary and voted to open an investigation on its own motion, stating that "[g]iven the competitive implications of [Verizon's] PASL service, it is particularly important that the Department ensure that the PASL service is not discriminatory and fully complies with the FCC's requirements." Id. at 11-12.⁹ In December 1997, the Department issued a Procedural Notice, requesting comments on whether Verizon's PAL and PASL tariffs complied with FCC requirements. See D.P.U./D.T.E. 97-88/98-18 (Phase II), Procedural Notice (December 12, 1997). NEPCC and Verizon filed comments on January 16, 1998, and January 26, 1998, respectively, which the Department took under advisement.

On December 7, 1998, NEPCC filed a motion to reopen the record for the purpose of permitting the development and consideration of additional evidence on the compliance of Verizon's tariffed rates for PAL and PASL services with the FCC requirements for state payphone tariffs, including the FCC's new services test. NEPCC argued that recent decisions from other states addressing the new services test were relevant to the issues before the Department. On May 14, 1999, the Hearing Officer granted NEPCC's motion to reopen the

⁹ The D.P.U. 97-18 (Phase II) investigation, which included examination of Verizon's PAL and PASL services as well as barriers to entry and exit in the payphone marketplace and public interest payphones, was consolidated with a subsequent investigation of the Department's operator services providers' rate cap. See D.P.U. 97-88/97-18 (Phase II), Order Opening Investigation (1997). The Department later severed the issue of public interest payphones from that docket and opened a new docket, D.T.E. 98-134.

record and conduct evidentiary hearings. See D.P.U./D.T.E. 97-88/97-18 (Phase II), Hearing Officer Ruling on NEPCC Motion to Reopen the Record (May 14, 1999). The Department held an evidentiary hearing on September 13, 1999. The evidentiary record consisted of 139 NEPCC exhibits, 43 Verizon exhibits, and eight responses to record requests. Verizon and NEPCC filed briefs on October 12, 1999, and reply briefs on October 29, 1999.

On November 28, 2000, the Department issued an Order finding that Verizon's existing PAL and PASL rates were "not payphone-specific," and required that Verizon file a total service long-run incremental cost ("TSLRIC") study to be used to determine the reasonableness of the existing rates within 60 days of the Order. See D.P.U./D.T.E. 97-88/97-18 (Phase II) at 14-15 (2000) ("DTE November 2000 Order"). In addition, the Department ordered Verizon to provide a cost-to-rate ratio analysis of its overhead costs. Id. The Department also found that local usage was not subject to the new services test and that primary interexchange carrier charge ("PICC") revenue should not be taken into account in setting payphone line rates. Id. at 17.

On December 14, 2000, NEPCC filed a motion for reconsideration of the DTE November 2000 Order, requesting that the Department reconsider a number of findings. Prior to issuance of the Department's Order addressing NEPCC's motion for reconsideration, Verizon filed its payphone-specific, TSLRIC study on January 29, 2001, in compliance with the DTE November 2000 Order. The Department requested comments on both NEPCC's motion for reconsideration and Verizon's TSLRIC study.

On March 2, 2000, the FCC Common Carrier Bureau issued its decision in In the Matter of Wisconsin Public Service Commission: Order Directing Filings, DA No. 00-347, Order, 15 FCC Rcd 9978 (Com. Car. Bur. 2000) (“Bureau Wisconsin Order”), which provided state commissions with additional guidance on the FCC’s new services test. In the Bureau Wisconsin Order, the FCC found that the new services test requires an incumbent LEC to demonstrate that its proposed payphone line rates do not recover more than the direct costs of the service, plus “a just and reasonable portion of the carrier’s overhead costs.” Bureau Wisconsin Order at ¶ 9. The FCC stated that costs must be determined by an appropriate forward-looking, economic cost methodology that is consistent with the principles articulated in the FCC’s Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) (“Local Competition Order”). Id. In the Bureau Wisconsin Order at ¶ 11, the FCC also stated that overhead allocations must be based on cost and may not be set artificially high in order to subsidize or contribute to other services.

On August 8, 2001, relying on this additional guidance from the FCC’s Bureau Wisconsin Order, the Department partially granted NEPCC’s motion for reconsideration. See D.P.U./D.T.E. 97-88/97-18-A (Phase II) at 5-6, Order on Motion for Reconsideration of NEPCC (2001) (“DTE Order on Reconsideration”). In the DTE Order on Reconsideration at 6, the Department found that local usage is subject to the FCC’s new services test and that Verizon must take into account PICC revenues when setting payphone line rates. In addition, the Department ruled that because it had not made a determination that Verizon’s existing rates

did not comply with the new services test, NEPCC's request for interim rates was inappropriate. Id. The Department also directed Verizon to recalculate its TSLRIC cost study to include local usage. Id.

Verizon filed its recalculated TSLRIC cost study on September 7, 2001. The Department held a further evidentiary hearing at the Department's offices on November 14, 2001. Verizon sponsored two witnesses: Peter Shepherd, director of regulatory policy and planning for Verizon; and Fredrick K. Miller, a senior specialist in Verizon's service-cost department. NEPCC sponsored Don J. Wood, an economic and regulatory consultant, as its witness. The evidentiary record for this portion of the case consists of 80 NEPCC exhibits, six Verizon exhibits, and nine responses to record requests. NEPCC and Verizon filed further initial briefs on December 12, 2001, and further reply briefs on December 31, 2001.

On January 31, 2002, the full FCC affirmed the Bureau Wisconsin Order, further clarifying the requirements of the new services test. In the Matter of Wisconsin Public Service Commission, Bureau/CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd 2051 ("Wisconsin Order"). The FCC stated that "[S]ection 276 requires that payphone service rates comply with the flexible, cost-based, forward-looking new services test." Wisconsin Order at ¶ 43. The FCC reiterated that "the new services test is necessary to ensure that central office coin services are priced reasonably because incumbent LECs may have an incentive to charge their competitors unreasonably high prices for these services and that "because [the FCC] required 'dumb' lines to be re-priced on the same basis as 'smart' lines, existing dumb

lines would also have to meet the new services test.” Id. at ¶ 47. In addition, the FCC stated that a forward-looking cost methodology is required for setting payphone line rates. Id. at ¶ 49.

On May 8, 2002, the Department issued an Order in D.T.E. 01-31, the Department’s investigation into an alternative regulatory plan for Verizon. See Verizon Alternative Regulation, D.T.E. 01-31-Phase I (2002) (“Phase I Order”).¹⁰ In a finding relevant to this docket, the Department determined that PAL and PASL services (as well as certain other Verizon retail services) are “wholesale-like” services that should be priced at unbundled network element (“UNE”) levels. Phase I Order at 36. The Department stated that while these services have historically been tariffed as retail services, they are “exclusively intended for purchase by other carriers as wholesale services rather than by end-users as retail services,” and, thus, the Department reclassified them as wholesale services. Id. The Department directed Verizon to submit UNE-based rates for its PAL and PASL services as part of its Phase I compliance filing. In Phase II of the Department’s Alternative Regulation investigation, the Department found that Verizon had complied with that directive, although the Department deferred to this docket – D.P.U./D.T.E. 97-88/97-18 (Phase II) – consideration of whether Verizon’s proposed rates for PAL and PASL services comply with

¹⁰ In D.T.E. 01-31-Phase I (2002) and Phase II (2003), as part of a long-term effort to evolve regulatory requirements and oversight to match the evolution of market forces, the Department implemented a comprehensive alternative regulation plan for regulatory treatment of Verizon’s rates.

the FCC's Payphone Orders. Verizon Alternative Regulation, D.T.E. 01-31-Phase II, at 42-43 (2003) ("Phase II Order").

On February 21, 2003, the Hearing Officer issued a notice requiring Verizon to file revised PAL and PASL rates based on the February 13, 2003 UNE rates from the Department's UNE Rates Proceeding, D.T.E. 01-20.¹¹ See D.P.U./D.T.E. 97-88/97-18 (Phase II) at 2, Hearing Officer Notice (February 21, 2003). The Hearing Officer Notice also sought comment on two questions: (1) whether Verizon's UNE-based PAL and PASL rates are consistent with the Telecommunications Act of 1996 and the Federal Communications Commission's Payphone Orders, including the Wisconsin Order; and (2) what, if any, issues are rendered moot by the filing of UNE-based rates. Id. In compliance with the Hearing Officer Notice, Verizon filed proposed UNE-based PAL and PASL rates on March 3, 2003, based on the February 13, 2003 rates under consideration in the Department's UNE Rates Proceeding, D.T.E. 01-20.

On April 15, 2003, Verizon filed revisions to its March 3, 2003 filing in this docket to "update TELRIC-based rates" and to "conform to the [FCC] requirements as set forth in the

¹¹ Investigation by the Department of Telecommunications and Energy on its own Motion into the Appropriate Pricing, based upon Total Element Long-Run Incremental Costs, for Unbundled Network Elements and Combinations of Unbundled Network Elements, and the Appropriate Avoided Cost Discount for Verizon New England, Inc. d/b/a/ Verizon Massachusetts' Resale Services in the Commonwealth of Massachusetts, D.T.E. 01-20 ("UNE Rates Proceeding"). In the UNE Rates Proceeding, the Department investigated proposed total element long-run incremental cost ("TELRIC") models for calculating UNE rates and proposed avoided cost studies for calculating the avoided cost wholesale discount. See UNE Rates Proceeding, Order Opening Investigation, D.T.E. 01-20, at 6-7 (2001).

Wisconsin Order” NEPCC and Verizon filed initial comments on April 24, 2003, and April 25, 2003, respectively, and reply comments on May 16, 2003, and May 19, 2003, respectively, that addressed both Verizon’s March 3, 2003, and April 15, 2003 filings.

On July 11, 2003, the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit Court”) affirmed the FCC’s Wisconsin Order. New England Public Communications Council, Inc. v. FCC, 334 F.3d 69 (D.C. Cir. 2003). Although the D.C. Circuit Court did not directly address the reasonableness of the FCC’s Wisconsin Order findings on the new services test (as those individual findings were not appealed), the D.C. Circuit ruled that the FCC has authority under Section 276 to regulate BOC intrastate payphone line rates. Id. at 75.

On July 17, 2003, NEPCC filed a motion requesting that the Department take administrative notice of the D.C. Circuit Court’s decision affirming the FCC’s Wisconsin Order; and on July 18, 2003, NEPCC filed a request for the Department to incorporate the final UNE rates from the UNE Rates Proceeding into this docket. Both NEPCC’s request and motion were granted by the Hearing Officer on July 23, 2003. On November 17, 2003, Verizon updated its PAL and PASL rates to reflect the final UNE rates approved in the UNE Rates Proceeding on July 16, 2003. On December 2, 2003, NEPCC submitted a letter to the Department indicating that it had “no detailed comments” on Verizon’s proposed rates as revised on November 17, 2003.¹²

¹² On March 29, 2004, Verizon filed a one-sentence request that the Department take administrative notice of a recent New York Appellate Court decision, In the Matter of (continued...)

III. REMAINING ISSUES

A. Introduction

The issues remaining for Department resolution in this proceeding include determination of the appropriate cost methodology for establishing payphone rates and an evaluation of Verizon's November 17, 2003 TELRIC-based proposal. In addition, we will discuss refund issues related to the re-pricing of PAL rates.

B. The Appropriate Cost Methodology

1. Introduction

In this section, we evaluate the appropriate cost methodology for establishing payphone rates in Massachusetts consistent with the FCC's new services test. The parties disagree whether the Department should apply a TELRIC or a TSLRIC cost standard for approving

¹²(...continued)

Independent Payphone Association of New York, Inc. v. Public Service Commission of the State of New York and Verizon New York, Inc., Case No. 93539 (March 25, 2004). On April 8, 2004, NEPCC filed a similar request for the Department to take administrative notice of the recent decision of the Michigan Public Service Commission in Michigan Pay Telephone Association v. Ameritech Michigan, Case No. U-11756 (March 16, 2004). Neither party filed a response to the other's request. Pursuant to 220 C.M.R. § 1.10(2), the Department may take official notice of such matters as might be judicially noticed by a court. See also, Cella, 39 Administrative Law and Practice § 561, Massachusetts Practice Series (1986). However, our regulations also require that "[n]o person may present additional evidence after having rested nor may any hearing be reopened after having been closed, except upon motion and showing of good cause." 220 C.M.R. § 1.11(8). Because neither request provided any grounds upon which the Department may find that good cause exists to accept this additional evidence so long after the record has been closed in this case, the requests of Verizon and NEPCC are denied.

Verizon's PAL and PASL rates.¹³ In addition, the parties disagree whether the Department has correctly classified Verizon's payphone services as wholesale services, or whether these services are more accurately designated as retail services.

2. TELRIC or TSLRIC

a. Verizon

Verizon argues that the Department should use the TSLRIC methodology to establish that Verizon's payphone line, feature, and local usage rates comply with the FCC's new services test (Verizon April 25, 2003 Comments at 3).¹⁴ The TSLRIC methodology, argues Verizon, is consistent with the FCC's classification of payphone services as retail offerings (id. at 4). Verizon further argues that the FCC specifically declined to impose a TELRIC-based, wholesale UNE pricing regime on payphone services in the First Payphone Order at ¶ 147 (id. at 5). Moreover, Verizon argues that, consistent with the FCC's Wisconsin Order, unless PSPs are telecommunications carriers, they are not entitled to TELRIC-based pricing of payphone services under the Act and FCC rules (id. at 6). Verizon points out that several state public utility commissions that have established payphone rates using the FCC's new services test, have rejected applying the TELRIC pricing regime to payphone services (id. at 7, citing

¹³ TELRIC is a method of determining the cost of network elements based on incremental costs of equipment and labor, not counting embedded costs. The FCC developed the TELRIC methodology to implement 47 U.S.C. §§ 251, 252, which outline obligations for incumbent LECs in opening up local telephone markets to competition.

¹⁴ Verizon argues that its current rates for payphone services, which are supported by a TSLRIC study, satisfy the FCC's new services test and comply with all FCC requirements (Verizon May 19, 2003 Reply Comments at 2). Therefore, argues Verizon, the Department does not need to take any action to change the payphone rates that are currently in effect (id. at 4).

Order, NY PSC Case Nos. 99-C-1684, 96-C-1174 (October 12, 2000); Order Denying Petition for Rehearing, NY PSC Case Nos. 99-C-1684, 96-C-1174 (September 21, 2001); Order, MI PSC Case No. U-011756 (March 8, 1999); Order, CO PUC Docket No. 98F-146T, Decision No. C99-497 (May 4, 1999)). Lastly, Verizon argues that, notwithstanding which forward-looking cost methodology the Department adopts for payphone services in this proceeding, the Department should continue to treat Verizon's payphone services as retail offerings for PSPs under Verizon's retail tariff (id. at 8).

b. NEPCC

NEPCC argues that, in the Bureau Wisconsin Order (later affirmed by the full FCC in the Wisconsin Order), the FCC's Common Carrier Bureau indicated that cost-based payphone rates should be determined by a forward-looking, economic cost methodology, and that both TELRIC and TSLRIC are examples of such methodologies (NEPCC April 24, 2003 Comments at 6 n.17). In addition, NEPCC argues that both TELRIC and TSLRIC refer to the same long-run incremental cost methodology, and that in the present context, the Department's application of either TELRIC or TSLRIC will yield the same result (NEPCC May 16, 2003 Reply Comments at 2-3). NEPCC argues that the differences in Verizon's reported results in its earlier TSLRIC study and its recent TELRIC analysis are the result of different inputs and assumptions, and not different methodologies (id. at 4). In actuality, argues NEPCC, Verizon has used the same cost models and the same underlying methodology in both analyses, with the primary difference being the level of the Department's review of the inputs and assumptions used by Verizon in its analyses (id.). Further, NEPCC argues that any "wholesale" or "retail"

distinction for Verizon's payphone services is independent of whether the Department denominates the cost methodology it applies as TELRIC or TSLRIC (id.).

Moreover, NEPCC argues that not only has Verizon ignored state commission decisions that have imposed TELRIC-based pricing (such as Payphone Tariffs, MD PSC Case No. 8763, Order No. 76787 (February 27, 2001)), the state commission decisions Verizon does rely on in its comments to support its position regarding TSLRIC pricing are no longer operative (id. at 6-8 and n.12). NEPCC states that the New York, Michigan, and Colorado public utility commission decisions cited by Verizon in its comments have either been overturned by courts or have been revised by the relevant state commission based on later FCC rulings (id. at 7-8).

In addition, NEPCC argues that although the FCC did not require state commissions to impose TELRIC-based pricing for payphone services in the Payphone Orders, the FCC also did not bar state commissions from using this pricing standard (id. at 5). NEPCC argues that the FCC reiterated this conclusion in the Wisconsin Order, in which the FCC again held out the option for states to use TELRIC-based pricing (id. at 6). According to NEPCC, the FCC has never determined that TELRIC and TSLRIC are inconsistent approaches or likely to produce inconsistent results (id.). Therefore, NEPCC argues that, by requiring TELRIC-based rates for Verizon's payphone services in this proceeding, the Department is acting in compliance with FCC directives (id.).

c. Analysis and Findings

We agree with NEPCC that the FCC has not precluded state public utility commissions from using a TELRIC pricing methodology to establish payphone rates consistent with the FCC's new services test. Although Verizon is correct that the FCC did not mandate TELRIC pricing for payphone rates, Verizon errs by insisting that only TSLRIC pricing would be consistent with FCC requirements. In the Wisconsin Order, the FCC stated that:

The LEC Coalition asserts that the [Bureau Wisconsin Order] mandates the exclusive use of the TELRIC pricing methodology and that this mandate is improper. The [Bureau Wisconsin Order], however, contains no such directive. Indeed, the [Bureau Wisconsin Order] states that LECs should use a forward-looking methodology that is "consistent" with the Local Competition Order. TELRIC is the specific forward-looking methodology described in 47 C.F.R. § 51.505 and required by our rules for use by states in determining UNE prices. States often use . . . TSLRIC . . . methodology in setting rates for intrastate services. It is consistent with the Local Competition Order for a state to use its accustomed TSLRIC methodology (*or another forward-looking methodology*) to develop the direct costs of payphone line service costs.

Wisconsin Order at ¶ 49 (internal footnotes omitted, emphasis added). Therefore, while the FCC does not mandate the use of TELRIC, the FCC has determined that the use of forward-looking methodologies, such as TELRIC, is appropriate when establishing payphone rates, and is consistent with its new services test.

Having determined that the FCC does not preclude the use of TELRIC-based pricing for payphone services, we turn to the question of whether we should require such pricing. For the following reasons, we determine that TELRIC-based pricing for Verizon's payphone services is appropriate. First, as NEPCC points out, the FCC has found that TELRIC-based

pricing of discrete network elements or facilities is “likely to be more economically rational than TSLRIC-based pricing of conventional services” (NEPCC May 16, 2003 Reply Comments at 3, citing Local Competition Order at ¶ 678). In other words, for pricing of discrete elements, or as here, a combination of elements, a cost analysis at the level of the network function is preferable to a cost analysis at the level of the complete service (see id.). Second, the use of TELRIC-based pricing, with which the Department has established rates for Verizon’s wholesale network elements in our D.T.E. 01-20 proceeding, is consistent with our conclusions, discussed below, regarding the wholesale nature of Verizon’s payphone services. Therefore, we conclude that TELRIC is the appropriate cost methodology to establish the payphone rates at issue in this proceeding.

3. Wholesale or Retail

a. Verizon

According to Verizon, the FCC has classified PAL and PASL services as retail, not wholesale, services (Verizon April 25, 2003 Comments at 5, citing Local Competition Order at ¶ 876 (“services that incumbent LECs offer to PSPs are retail services provided to end users, and should be available at wholesale rates to telecommunications carriers and Section 251(c)(4), but need not be made available at wholesale rates to independent PSPs that are not telecommunications carriers”). Verizon asserts that even though the Department determined payphone services to be in the nature of wholesale services in its D.T.E. 01-31 proceeding, “the Department is not at liberty to override the FCC by making payphone services available to all PSPs as a wholesale tariff offering” (id. at 8). Verizon also notes that

the Department has historically priced payphone access lines in the same way as business access lines and “[n]othing in the Act nor the FCC’s requirements precludes the Department from continuing to apply the same tariffed retail rates to PALs and business lines based on Verizon’s previously filed TSLRIC studies” (*id.* at 8, *citing* D.P.U. 86-124-D at 19-20 (1986), D.P.U. 89-300, at 79, 166, 272-73 (1990), D.P.U. 91-30, at 84-87 (1991), D.P.U. 92-100, at 53-55 (1992), and D.P.U. 93-125, at 22 (1994)). Verizon also notes that retail treatment for these services reflects Verizon’s current rate structure for payphone services, noting that there is no wholesale offering similar to the flat-rated PAL usage component (*id.*).

b. NEPCC

NEPCC disputes Verizon’s claim that the Department must continue to treat PAL and PASL services as retail offerings. NEPCC argues that the Department has already settled this question in D.T.E. 01-31, in which the Department concluded that PAL and PASL services should be treated as wholesale services for regulatory purposes, and Verizon did not appeal that conclusion (NEPCC April 24, 2003 Comments at 14-15).

c. Analysis and Findings

Historically, the Department has treated Verizon’s payphone access services as retail services, tariffed in Verizon’s retail tariff, M.D.T.E. No. 10, and priced equivalent to business exchange services. *See* D.P.U. 86-124-D at 19-20 (1986), D.P.U. 89-300, at 79, 166, 272-73 (1990), D.P.U. 91-30, at 84-87 (1991), D.P.U. 92-100, at 53-55 (1992),

D.P.U. 93-125, at 22 (1994).¹⁵ However, in the Department's Phase I Order in D.T.E. 01-31, the Department specifically reclassified payphone access services as wholesale services, finding that they are "exclusively intended for purchase by other carriers as wholesale services rather than by end-users as retail services" and required them to be priced in a "UNE-based manner" (i.e., TELRIC-based pricing). Phase I Order at 36, 95. In reclassifying PAL and PASL services, as well as other "wholesale-like" services, the Department sought to establish regulatory pricing consistency for Verizon's wholesale services on the basis that "lowering all wholesale service rates closer to incremental cost improves efficiency, promotes competition, and creates a consistent framework for all wholesale services." Phase II Order at 42. Verizon did not challenge that finding on reconsideration or on appeal. Verizon complied with the Department's conclusion in D.T.E. 01-31 by submitting TELRIC-based compliance rates in accordance with Department directives in that docket. Although the Department decided to defer approval of those rates to the instant docket, because the "Payphone Docket is specifically addressing, inter alia, the pricing of payphone services, and has a fully developed record already established" (id. at 43), the Department's reclassification of these services from retail to wholesale was settled in the D.T.E. 01-31 case, and the Department gave no indication that it would entertain reconsideration of that decision in this docket.

¹⁵ The Department based PAL rates on business rates because "the access line used by a[n] IPP] is similar to any other business line." D.P.U. 86-124-D at 19 (1986).

Further, the FCC has not precluded states from classifying payphone access services as wholesale services. In the Local Competition Order at ¶ 876, upon which Verizon's relies in its comments, the FCC found that IPPs were not "telecommunications carriers" under the Act because many IPPs were end users. However, in Massachusetts, the Department has determined that IPPs are telecommunications common carriers under G.L. c. 159, § 12, and not end-users.¹⁶ The Department requires IPPs to obtain registrations and to comply with all applicable common carrier requirements.¹⁷

Finally, we reject Verizon's claim that we should not change the regulatory classification of PAL and PASL services because the retail treatment for these services "reflects Verizon MA's current rate structure for payphone services" (Verizon April 25, 2003 Comments at 8). The TELRIC-based rates that we adopt for these services are based on a wholesale rate structure that differs in some respects from the retail rate structure of the existing rates, including, as Verizon points out, the absence of a flat-rate usage component. As noted above, the Department found in D.T.E. 01-31-Phase I that there were clear benefits to reclassifying PAL and PASL services from retail to wholesale, consistent with other

¹⁶ Verizon will not provide PAL or PASL service to an IPP that is not registered with the Department. But see D.P.U. 89-20, at 22-23 (1991) (finding that most payphones are public but that there could be some payphone providers that operate private payphones where "access to a pay telephone is limited to those with express specific permission of the location owner or its agent").

¹⁷ On October 7, 1997, the FCC preempted the Department's jurisdiction to determine (and tariff) payphone rates pertaining to local services provided to an end user who puts coins into a payphone to connect to service. See First Payphone Order at ¶¶ 60-61. The preemption does not, however, apply to those services provided to an end user of payphone service through the use of an operator. IPPs that provide their own operator services are required to tariff those services at the Department.

“wholesale-like” services, and that those benefits outweighed any changes in rate structure that resulted from the reclassification.¹⁸

C. Verizon’s TELRIC-Based Proposals

1. Introduction

As discussed above, Verizon made a series of filings in this docket (March 3, April 15, and November 17, 2003) to comply with the Department’s directives to propose TELRIC-based rates for its PAL and PASL services. Verizon’s March 3, 2003 filing proposed PAL and PASL rates based on non-final UNE rates then under review in the Department’s UNE Rates Proceeding, D.T.E. 01-20. In its April 15, 2003 filing, Verizon updated the rates proposed in the March 3, 2003 filing (although the rates were still based on non-final UNE rates), and purportedly conformed the rates to meet the requirements of the FCC’s Wisconsin Order. According to Verizon, the changes between the April and March filings included the following:

- (1) the recalculation of the TELRIC-based loop rate for the unlimited (flat-rated) PAL offering to reflect a weighting by density zone distributions for Massachusetts exchanges where the service is available;

¹⁸ While Verizon’s proposed UNE-based PAL and PASL rates have been under review in this docket, the Department has allowed Verizon to continue to tariff existing PAL and PASL rates in its retail tariff, Tariff M.D.T.E. No. 10, despite the Department’s having reclassified these services as wholesale in the Phase I Order, pending a final Order in this docket. Because we make clear in this Order that PAL and PASL services are reclassified as wholesale services, we now require Verizon to remove those services from its retail tariff, Tariff M.D.T.E. No. 10, and tariff them in an appropriate wholesale tariff (see Section IV, below, for additional discussion).

- (2) the addition of payphone related, direct retail costs associated with non-network retail functions (e.g., marketing, billing and customer services) that were excluded from Verizon's TELRIC studies;
- (3) the development of a payphone-specific resale discount, calculated using the retail overhead factor described above;
- (4) the application of current retail rates for directory assistance ("DA"), DA Call Completion, and toll usage and operator surcharges because TELRIC-based rates for these elements were not developed in D.T.E. 01-20; and
- (5) the inclusion of the federally mandated Subscriber Line Charge ("SLC") as a current retail rate applied to PALs and PASLs as business lines.

(Verizon April 25, 2003 Comments at 1).

Verizon's November 17, 2003 filing updated the rates to reflect the final UNE rates established in D.T.E. 01-20. Verizon's November 2003 filing also differs from the April 2003 filing in that Verizon factored in 1) timing effects; 2) retail expense adjustments; and 3) changes to the FCC's SLC.¹⁹

In this section, the Department determines whether Verizon's PAL and PASL rates as proposed in its November 2003 filing comply with our directive for TELRIC-based rates, and

¹⁹ Both Verizon's April 2003 and November 2003 TELRIC proposals represent snapshots of the number of PAL lines and PASL lines in operation in different density zones over time. Therefore, as lines are taken out of service or put in service, the timing of when the snapshot is taken affects Verizon's revenues as indicated in Verizon's proposals. In addition, in accordance with the Department's directives in D.T.E. 01-20 and Consolidated Arbitrations, D.P.U./D.T.E. 96-73/74, 96-75, 96-80/81, 96-83, 96-94, Verizon adjusted its retail expense factor from 8.27 percent in the April 2003 filing to 8.41 percent in the November 2003 filing. Finally, in accordance with FCC directives, Verizon changed the SLC from \$7.13 per line in the April 2003 filing to \$6.45 per line in the November filing. As a result of these adjustments, Verizon's current and projected average revenue per line show an annual payphone revenue of negative \$6.1 million in the November filing, as opposed to negative \$5.5 million in the April filing.

also whether the rates comply with FCC requirements for payphone access line rates, including the new services test. We will discuss the following issues: (1) whether loop costs should be disaggregated between PAL and PASL lines; (2) whether payphone loop rates should be deaveraged based on density zones or averaged statewide based on weightings from payphone distribution throughout the state; (3) Verizon's proposed deaveraged loop rate for PAL Unlimited service; (4) Verizon's proposed retail expense factor; (5) whether PASL coin port costs are the same as PAL port costs; and (6) Verizon's local minutes-of-use assumptions.

2. Positions of the Parties

a. Verizon

Verizon claims that its TELRIC filing complies with the Department's directives to update payphone rates using TELRIC-based prices contained in Verizon's compliance filings in D.T.E. 01-20 (Verizon May 19, 2003 Reply Comments at 3).²⁰ Verizon asserts that its payphone rates are based on density zone weightings specific to PAL and PASL services in Massachusetts (id. at 5). Contrary to NEPCC's claim, Verizon argues that it used the most recent density zone weightings from October 16, 2001, to determine the TELRIC-based rates in its filings (id.). Verizon also contends that it proposed a higher, deaveraged loop rate for PAL Unlimited service to reflect the different weighting for the service, given that PAL

²⁰ Except for the differences discussed in n.19, above, Verizon's April and November proposals are similar such that the parties' comments concerning Verizon's April 2003 proposal are applicable to the November 2003 proposal as well. In response to Verizon's November 2003 proposal, NEPCC stated that it had "no detailed comments" on Verizon's revised proposal except to state that the proposal "further confirms" NEPCC's prior arguments (D.P.U./D.T.E. 97-88/97-18 (Phase II), NEPCC Letter (December 2, 2003)).

Unlimited service currently is not offered statewide, as compared to the other payphone line services (id. at 6). Verizon claims that the differential is reasonable because flat-rated PAL service is not available in any of the metro exchanges and only in some urban exchanges (id.). Furthermore, Verizon argues that the Department should reject NEPCC's attempt to expand its flat-rated PAL service statewide (id. at 7).

Verizon claims that its retail expense factor, which captures retail costs (e.g., billing, administrative, and customer service expenses) attributable to its provision of payphone services to PSPs, is permissible under the FCC's Wisconsin Order (id. at 10). According to Verizon, unlike UNE rates, the FCC ruled that payphone line rates may include a retail expense factor because retail functions are being provided to PSPs by the LEC (id.). Verizon argues that it developed its retail expense factor in compliance with the Department's February 21, 2003 directive to update its proposed TELRIC-based payphone rates to be consistent with the FCC's Wisconsin Order (id. at 11). Verizon also states that a "comparable resale discount" would apply to resellers because the retail functionality and associated expenses would be assumed by the reseller (id.).

b. NEPCC

NEPCC argues that Verizon's PAL rates do not comply with federal requirements (NEPCC April 24, 2003 Comments at 1). NEPCC claims that Verizon's UNE loop rate of \$14.20 for measured PAL service fails to apply the density weighting that Verizon

previously agreed should be applied to PALs (id. at 8).²¹ According to NEPCC, Verizon's use of new, unsupported weightings increases the loop costs for PAL lines (id. at 9).

NEPCC also challenges Verizon's loop rate for PAL Unlimited service, contending that Verizon has acted inappropriately when it introduced this change at the last minute (id.). NEPCC contends that the Department did not require this change and nothing in the FCC's Payphone Orders, including the Wisconsin Order, suggests that it is appropriate (id.). NEPCC argues that this special loop rate is based solely on Verizon's unilateral choice not to provide a PAL Unlimited service, and has nothing to do with PAL service costs (id. at 11).

In addition, NEPCC claims that Verizon, which had initially represented that a PASL coin port cost more than a PAL port, should not now be allowed to argue that both ports cost the same (id. at 12). NEPCC states that in its April 15, 2003 filing, Verizon, for the first time, advanced the position that it costs no more to provide more functionality using additional equipment with a coin port than it does with a PAL port (id.). Also, NEPCC argues that Verizon's proposed usage rate demonstrates how PAL subscribers have been grossly overcharged for years (id. at 13). NEPCC argues that Verizon has provided no work papers or other support to justify its proposed local minutes-of-use assumptions (id.).

Lastly, NEPCC claims that Verizon's new retail expense factor is not required by the FCC (id. at 14). NEPCC contends that the Department has made it clear that PAL and PASL services are wholesale services, and Verizon's retail expense factor contradicts that finding

²¹ Verizon proposed a UNE loop rate of \$14.20 for measured PAL service in both its April 15, 2003 and November 17, 2003 filings.

(id.). Had Verizon wanted to contest the Department's conclusion concerning the wholesale classification of PAL and PASL services, NEPCC asserts that Verizon should have done so as part of the D.T.E. 01-31 proceeding rather than in this docket (id. at 14-15). In addition, NEPCC argues that there is no record to support Verizon's proposed retail expense factor (id. at 15).

3. Analysis and Findings

First, we address the issue of whether payphone service loop costs should be disaggregated by PAL and PASL service, as suggested by NEPCC. As Verizon notes, neither the FCC nor the Department required that loop costs be PAL- and PASL-specific. Contrary to NEPCC's claim, the Department did not require Verizon to file a PAL-specific cost study in the DTE November 2000 Order, but rather contemplated that loop costs would be aggregated between PAL and PASL services. See DTE November 2000 Order at 13-17. Moreover, we determine that separate cost studies for each service are unnecessary because, as Verizon has demonstrated, there is little difference in cost between PAL and PASL lines, based on the very close relationship between PAL and PASL access line distributions by density zone (Exh. VZ-MA-47, at 9). In addition, the record indicates that the distribution of payphone access lines by density zone is similar to the distribution of the loops from Verizon's D.T.E. 01-20 TELRIC loop study (see id. at 8). In D.T.E. 01-20, the Department approved a Verizon loop cost study that was not disaggregated by the type of service that was being provided over the

loop. See D.T.E. 01-20, Verizon Compliance Filing (stamp-approved July 16, 2003).²²

Therefore, consistent with the Department's approval of the compliance filing in

D.T.E. 01-20, we determine that Verizon is not required to disaggregate loop costs by PAL and PASL service.

Next, we address the issue of whether PAL and PASL loop rates should be deaveraged by density zone or should be averaged statewide based on weightings from payphone distributions throughout the state. Verizon proposes a statewide weighted average loop rate of \$14.20 based on current UNE loop rates in the four density zones and the distribution of PAL and PASL lines throughout the state.²³ UNE-loop rates are deaveraged by cost into four density zones in Massachusetts, and we determine that we should do the same for PAL and PASL loop rates. Verizon consistently has argued in this proceeding that there is no cost difference between loops for PALs and PASLs and loops for payphones and other network access services, because access line distributions are similar for these different services (see, e.g., Verizon Brief at 10 ("There is no evidence that direct costs of the link differ based on whether it is a residence, business or PAL customer. The cost to provide a loop will be the same to a given location regardless of customer classification")). Thus, we are persuaded that deaveraged loop rates for PAL and PASL services, rather than averaged statewide rates, would be more consistent with our TELRIC principles from D.T.E. 01-20. Verizon shall use

²² Because we are adopting TELRIC-based rates for payphone line services in this docket which are derived from the UNEs we established in D.T.E. 01-20, we are guided in this process by our related findings in the D.T.E. 01-20 proceeding.

²³ The only exception is the rate for a PAL Unlimited service loop, which we discuss below.

deaveraged loop rates based on the current four-zone UNE configuration for its PAL and PASL loop rates.

Verizon also seeks to implement a new separate loop rate for PAL Unlimited service of \$15.69, which is \$1.49 more than the loop rate for PAL Measured service (see Verizon November 17, 2003 Filing, Tab B, Attachment IV). With the reclassification of PAL services from retail to wholesale, Verizon will no longer offer payphone lines services on a resold basis to CLECs (see Section IV, below, for additional discussion). Thus, PAL service will be available only on a wholesale basis, not on the present retail and resale basis. The basic structure of the proposed TELRIC-based rates (i.e., a loop, port, and local usage rate) eliminates the previous usage distinction between PAL Unlimited and PAL Measured services. Thus, there is no need for Verizon to offer a PAL Unlimited service on a wholesale basis. The separate loop rate issue raised by NEPCC, therefore, is moot.²⁴

Next, we address Verizon's proposed retail expense factor. In the Wisconsin Order at ¶ 50, the FCC stated that "LECs may include in their direct cost calculations those 'retail' costs, such as marketing and billing costs, that they can show are attributable to payphone line services." In doing so, however, the FCC made clear that it was not mandating that LEC rates had to include retail expenses. Id.; see also Wisconsin Order at ¶¶ 49, 50 (FCC found that state commissions had the discretion to select among different forward-looking cost methodologies that were "consistent" with the Local Competition Order, including TELRIC

²⁴ Elimination of the usage distinction between PAL services also renders moot the issue of Verizon's minutes-of-use assumptions.

pricing; states could, but were not required to, include retail expenses in payphone line rates.). Thus, we agree with NEPCC that, although LECs may propose retail expenses, the states have discretion to determine whether to allow recovery of those expenses. However, we find that it would be inconsistent with our wholesale classification of payphone line rates, and use of the TELRIC methodology, to allow recovery of retail expenses. It is axiomatic that wholesale services should not recover retail costs and the TELRIC methodology specifically excludes such costs. Moreover, Verizon's UNE rates, from which the payphone line rates are derived, are calculated to include wholesale marketing expenses. Therefore, the Department rejects Verizon's proposed retail expense factor.

In addition, in its November 17, 2003 filing, Verizon proposes a PAL port rate of \$2.22 and a coin port rate of \$2.48 (a difference of \$.26 between the two rates), based on the final UNE rates from D.T.E. 01-20 (see Verizon November 17, 2003 filing at Workpaper, citing Tariff M.D.T.E. No. 17, Part M, § 2.6.1). In its April 2003 comments, NEPCC raised objections about the similarity of the coin port and PAL port rates contained in Verizon's April 15, 2003 filing, given that NEPCC would expect the coin port rate (which Verizon's retail payphone business pays) to be higher due to the need for more equipment to provide the additional functionality. We note that in Verizon's November 2003 filing, the proposed coin port rate is slightly higher, consistent with NEPCC's observations. Moreover, Verizon's \$2.48 coin port rate and \$2.22 PAL port rate were approved in D.T.E. 01-20 (see Tariff M.D.T.E. No. 17, Part M, § 2, at 8) and the parties have provided no basis upon which to establish the rates otherwise in this proceeding.

In addition, Verizon contends that adoption of the November 17, 2003 proposed TELRIC-based rates will reduce its annual revenue by several million dollars,²⁵ and argues that the Department should allow it to recover that lost revenue through an exogenous adjustment under its Alternative Regulation Plan (Verizon April 25, 2003 Comments at 12). We determine that it is premature for the Department to decide this issue, in advance of Verizon filing such a petition.

Therefore, with the changes directed above, we find that Verizon's PAL and PASL rates will be in compliance with our directive for TELRIC-based rates and also with FCC requirements for payphone access line rates.²⁶

D. Refund Issues

1. Introduction

NEPCC asserts that in 1997, when the FCC permitted incumbent LECs to start collecting dial-around compensation for calls made from their payphones, the FCC also indicated that payphone access rates for competitors must comply with the FCC's cost standard, and required that cost-based rates be in effect by April 15, 1997. Accordingly,

²⁵ See n.19, above.

²⁶ The decision in United States Telecommunications Ass'n v. Federal Communications Comm'n, 359 F.3d 554 (D.C. Cir. 2004), and the subsequent decisions of the United States Solicitor General and the FCC not to appeal, suggest that some change in the UNE/TELRIC pricing regime may occur at the federal level and may have state-level implications. If significant change occurs, the Department may, either upon petition or sua sponte, review then-existing rates for their continued vitality in light of such a change. See MCI v. Department of Telecommunications and Energy, No. SJC-09120, slip op. at 7 (Mass. Supreme Judicial Court June 21, 2004) (available at <http://www.socialaw.com/sjcslip/sjcJune04p.html>).

NEPCC argues that, if the Department concludes that Verizon's existing PAL rates, in effect since April 1, 1997, do not satisfy the FCC's cost standard and must be reduced, the Department must also order a refund retroactive to April 15, 1997.²⁷

2. Positions of the Parties

a. Verizon

Verizon states that its existing payphone rates comply fully with the FCC's requirements (Verizon April 25, 2003 Comments at 4, 6). Verizon argues that even if the Department were to require changes to payphone service rates, no rate refunds are required because the existing rates were previously approved as lawful and considered compliant with the FCC's applicable pricing requirements (Verizon May 19, 2003 Reply Comments at 12). Verizon claims that to approve rates retroactively is neither authorized under Massachusetts law nor required under the FCC's Payphone Orders (*id.*). Accordingly, Verizon states that it would be unjust and unreasonable for the Department to ignore tariffed rates, as NEPCC suggests, and permit refunds based on a subsequent ruling (*id.*). Moreover, Verizon contends that a rate refund would be inconsistent with both the filed rate doctrine, which limits regulatory authorities to prospective adjustments of current rates, and its corollary, the prohibition against retroactive ratemaking (Verizon Reply Brief at 18).

²⁷ In Implementation of the Pay Telephone Reclassification and Compensation Provisions to the Telecommunications Act of 1996, CC Docket 96-128, Second Clarification Order, 12 FCC Rcd 21370 (Com. Car. Bur. 1997) at ¶ 25 ("Second Clarification Order"), the Common Carrier Bureau stated, "A LEC who seeks to rely on the waiver [of time to file intrastate tariffs for payphone services] granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates."

b. NEPCC

NEPCC indicates that in order for Verizon to be eligible for dial-around compensation on its payphones, the FCC required Verizon to have PAL rates in effect that comply with the requirements of the FCC's Payphone Orders by April 15, 1997 (NEPCC April 24, 2003 Comments at 16). According to NEPCC, because Verizon's PAL rates were not in compliance, Verizon can only retain its eligibility for dial-around compensation by reimbursing its customers for the overcharges since that time (id. at 16-17). NEPCC indicates that a number of states have ordered refunds based on the difference between PAL rates set in compliance with the Payphone Orders and non-compliant PAL rates previously in effect (id. at 17-18). NEPCC argues that reducing Verizon's rates on a prospective-only basis would ignore the FCC's directives in the Payphone Orders and would give Verizon a windfall for the past five years (id. at 18).

3. Analysis and Findings

For the following reasons, we do not require Verizon to refund the difference between the PAL rates we establish today, and the PAL rates that have been in effect since April 1997. As the parties are aware, the Department has allowed the rates that were in effect on April 1, 1997, to stay in effect throughout the Department's investigation in this docket. In several other rate investigations, the Department has allowed interim rates to go into effect, or has allowed existing rates to continue, subject to a true-up mechanism. However, when a true-up approach is to be used, the Department has explicitly so stated. See, e.g., UNE Rates Proceeding, D.T.E. 01-20, at 14, Order on Parties' Motions for Extensions (2002) (requiring

interim switching rates to filed with a retroactive true-up upon final approval). At no point in the instant proceeding did the Department indicate that we would employ a true-up or refund mechanism. To the contrary, in an earlier Order in this docket, the Department stated that interim PAL rates were not warranted because the Department did not find that Verizon's existing PAL rates violated the FCC's new services test. DTE Order on Reconsideration at 6.

In addition, lawful rates remain in effect, whether under G.L. c. 159, § 14, or under G.L. c. 164, § 94.²⁸ The Department has never made a determination that Verizon's April 1997 payphone rates were inconsistent with the FCC's requirements or were otherwise unlawful. That the Department now finds, based on deliberations and regulatory changes that took place as a result of the Department's D.T.E. 01-31 and D.T.E. 01-20 proceedings, and based on additional guidance on pricing standards from the FCC and reviewing courts, that Verizon must modify its PAL rates in order to comply with FCC and Department requirements, does not render the prior PAL rates either unlawful for the period the prior rates were in effect or subject to a refund. See Colorado Payphone Association v. U.S. West Communications, Inc., CO PUC Docket No. 98F-146T at 2-3, Decision Denying Applications for Rehearing (adopted July 14, 1999) (holding that a refund was not required when the state

²⁸ Investigation by the Department of Telecommunications and Energy on its own Motion as to the Propriety of the Rates and Charges Set Forth in the Following Tariff: M.D.T.E. No. 17, filed with the Department on April 10, 2002, to become effective May 10, 2002, by Verizon New England, Inc. d/b/a Verizon Massachusetts, D.T.E. 02-26, at 5, Letter Order (May 9, 2002) (holding that UNE rates established in the Consolidated Arbitrations proceeding are in compliance with FCC requirements and the ongoing review of those rates does not change that status until a superseding order of the Department issues).

public utility commission decreased PAL rates after April 1997 when decrease was warranted because cost-to-price ratios for basic PAL service were excessive).

Moreover, although NEPCC argues that the FCC requires the Department to order a refund if the Department establishes PAL rates that are lower than the rates that were in effect in April 1997 (NEPCC April 24, 2003 Comments at 16-19, citing Second Clarification Order at ¶ 25), we conclude that NEPCC's position requires too broad a reading of the Common Carrier Bureau's language. The Second Clarification Order states that a reimbursement or credit would be necessary if a LEC relied on the limited waiver of time granted in that order (i.e., until May 19, 1997) to file its intrastate payphone services tariff.²⁹ Verizon filed its tariff with the Department on January 24, 1997 (i.e., before issuance of the Second Clarification Order), and, therefore, Verizon did not rely on the FCC's waiver of time granted in that order. Therefore, for the reasons discussed above, the Department concludes that a refund of Verizon's PAL rates is not required.

IV. CONCLUSION

Based on the above directives, Verizon shall submit a compliance filing, including tariff pages, within two weeks of the date of this Order. The proposed tariff pages shall have an effective date 90 days from the date of the compliance filing. NEPCC may submit comments on the compliance filing no later than one week from the date of Verizon's filing. NEPCC's comments shall be limited to Verizon's compliance with the directives in this Order. Verizon's

²⁹ See Second Clarification Order at ¶¶ 2, 25.

reply comments are due no later than one week from the date of the filing of NEPCC's comments.

Verizon's compliance filing shall also include tariff changes to remove PAL and PASL services from Tariff M.D.T.E. No. 10 and to tariff them in the appropriate wholesale tariff. This reclassification will mean that Verizon is no longer required to offer PAL and PASL services to CLEC resellers. See 47 U.S.C. § 251(c)(4)(A) (ILECs have a duty "to offer at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers"). In light of the fact that Verizon will be filing revised tariff pages to eliminate PASL from retail rates, we find it reasonable to provide for a 90-day transition period to allow sufficient time for notification to resellers and for resellers to notify their IPP customers, and for these carriers to adjust their business plans accordingly. Verizon shall provide at least 60 days notice to CLEC resellers in advance of the elimination of PAL and PASL services as resale services. Because the resale services will be in transition, it is appropriate for Verizon to continue charging the existing rates for PAL resold services (not the new rates approved in this Order) during the transition. However, on the ninetieth day following the date of issuance of the Department's Order approving Verizon's compliance filing, the new rates shall be effective.

V. ORDER

After due notice, hearing and consideration, it is

ORDERED: That Verizon Massachusetts shall submit a compliance filing consistent with the directives in this Order within two weeks of the date of this Order; and it is

FURTHER ORDERED: That Verizon Massachusetts and New England Public Communications Council, Inc., shall comply with all directives contained in this Order.

By Order of the Department,

/s/
Paul G. Afonso, Chairman

/s/
James Connelly, Commissioner

/s/
W. Robert Keating, Commissioner

/s/
Eugene J. Sullivan, Jr., Commissioner

/s/
Deirdre K. Manning, Commissioner

Appeal as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).